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Copyright and the First Amendment: Nurturing the Seeds for Harvest: *Harper & Row, Publishers v. Nation Enterprises*, 105 S. Ct. 2218 (1985)

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Note

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Harper & Row, Publishers v. Nation Enterprises, 105 S. Ct. 2218 (1985)

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I. INTRODUCTION

The Copyright Act[1] is primarily concerned with maximizing the public availability of literature, music, and the arts—all for the ultimate benefit of society. To accomplish this goal, an economic incentive is provided on the assumption that individuals will not invest their talent in creative endeavors without some type of reward.[2] This

1. 17 U.S.C. §§ 101-810 (1982). The Copyright Act is the legislative response to the Copyright Clause, U.S. CONST. art. I, § 8, cl. 8, which provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

2. *See, e.g.*, Mazer v. Stein, 347 U.S. 201, 219 (1954): "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and the useful Arts.'"

The economic assumptions implicit in the American copyright scheme have

incentive takes the form of a limited monopoly that endows the creative individual with the exclusive rights to her intellectual property.[3] The author's rights are limited,[4] however, in order to maximize the public dissemination of creative works and thereby advance the public welfare.[5] Notwithstanding these limitations, copyright grants to an author a partial monopoly in the particular manner she has used to express herself. The tensions between copyright and first amendment freedoms begin to crystallize when one considers that the first amendment is designed to ensure an unimpeded flow of information to the public.[6] Much attention[7] has focused on whether the copyright law is

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been discussed by other commentators. *See* Perlman & Rhinelander, *Williams & Wilkins Co. v. United States: Photocopying, Copyright, and The Judicial Process*, 1975 SUP. CT. REV. 355; Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Breyer, *Copyright: A Rejoinder*, 20 UCLA L. REV. 75 (1972); Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 UCLA L. REV. 1100 (1971).

3. 17 U.S.C. § 106 (1982) provides:

> Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

4. The exclusive rights of 17 U.S.C. § 106 are specifically limited by the provisions of 17 U.S.C. §§ 107 through 118. 17 U.S.C. § 106 (1982).
5. *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 429 (1984); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).
6. The first amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech. . . ." U.S. CONST. amend. I.
7. The current discussion resulted from two articles published in 1970. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970); Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970). The debate has continued in the courts and among the commentators. *See, e.g.*, Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 105 S. Ct. 100 (1984); Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Keep Thomson Governor Comm. v. Citizens For Gallen Comm., 457 F. Supp. 957 (D.N.H. 1978); Triangle Publications v. Knight-Ridder Newspapers, 445 F. Supp. 875 (S.D. Fla. 1978); Rohauer v. Killiam Shows, Inc., 379 F. Supp. 723 (S.D.N.Y. 1974), *rev'd on other grounds*, 551 F.2d 484 (2d Cir.), *cert. denied*, 431 U.S. 949

in an unconstitutional abridgement of first amendment interests in free speech.[8] Prior to this past Term, the Supreme Court had not directly addressed the question.[9]

In *Harper & Row, Publishers v. The Nation Enterprises*,[10] the Court was presented questions concerning the interplay of copyright and the first amendment: whether the first amendment requires that the scope of copyright protection for a nonfiction work be narrowed, and whether the first amendment should prevail over copyright in a fair use case in which the copyrighted material is politically significant.[11] The public interest in the unfettered access to President Ford's memoirs, it was argued, should outweigh the owner's right to control the dissemination of his work. The issue of "public interest" as a consideration distinct from traditional fair use inquiry has been fermenting in the lower courts.[12] In *Harper & Row*, the Supreme Court curtailed the vitality of the public interest as a determinative factor in copyright infringement cases by refusing to acknowledge a "public figure exception" to the copyright statute. Justice O'Connor noted that the idea/expression dichotomy and the traditional fair use privilege are sufficient guardians of first amendment goals and, therefore, the application of the independent first amendment privilege is not warranted. The court concluded that the appropriation of 300 copyrighted words from the Ford memoirs did not constitute a fair use and thus infringed Harper & Row's copyright.

This Article focuses upon the potential tensions that exist between copyright and the first amendment, and the arguments for a "public interest" or first amendment exception to the proprietary rights of a copyright holder. In particular, this Article examines the facts and holdings in *Harper & Row*, including the Court's application of the fair use doctrine and argues that the Court properly rejected the use of the

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(1977); Walt Disney Prods. v. Air Pirates, 345 F. Supp. 108 (N.D. Cal. 1972), *aff'd in relevant part*, 581 F.2d 751 (9th Cir. 1978); Marvin Worth Prods. v. Superior Films Corp., 319 F. Supp. 1269 (S.D.N.Y. 1970); Time, Inc. v. Bernard Geis Assocs., 293 F. Supp. 130 (S.D.N.Y. 1968). *See also* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 CALIF. L. REV. 283 (1979); Rosenfield, *The Constitutional Dimension of "Fair Use" in Copyright Law*, 50 NOTRE DAME LAW. 790 (1975); Sobel, *Copyright and the First Amendment: A Gathering Storm?*, 19 COPYRIGHT L. SYMP. (ASCAP) 43 (1969).

8. While both the congressional authority to grant copyrights and the first amendment are included in the Constitution, the amendment supersedes any prior inconsistent material. *See* 1 M. NIMMER, NIMMER ON COPYRIGHT, § 1.10[A], at 1-63 to 1-64 (1985). Thus, any significant interference with first amendment values should render the copyright law unconstitutional.
9. However, the Supreme Court did accept briefs on the issue in Smith v. California, 375 U.S. 259 (1963).
10. 105 S. Ct. 2218 (1985).
11. Brief for Petitioner at i, Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218 (1985).
12. *See supra* note 7 and accompanying text.

public interest consideration apart from fair use analysis. Application of this exception would result in irreparable damage to a copyright system that has developed a durable and constitutionally satisfactory internal method of accommodating and enhancing first amendment values with only a modicum of hindrance to the accessibility of politically significant information.

II. BACKGROUND

In February 1977, one month after leaving office, Gerald Ford consummated an agreement granting Harper & Row, Publishers, Inc. and Reader's Digest, Inc. exclusive rights to publish his then unwritten memoirs.[13] Ford was provided a writer to assist him in the monumental task of culling the voluminous record of the post-Watergate White House era. Distilled from over 6,000 pages of transcribed oral interviews and a "mountain of documents,"[14] the first draft was completed nearly two years later.[15]

As the memoirs were nearing completion in March 1979, Harper & Row negotiated an exclusive prepublication licensing agreement with Time, Inc. In return for permission to print excerpts from the manuscript, Time paid $12,500 in advance and agreed to pay an additional $12,500 when its edition was complete.[16] Time retained the right to renegotiate the second $12,500 payment in the event that any of the material was published before Time released its article.[17]

About three weeks before the scheduled release of the Time article, an unidentified source secreted an unauthorized draft of the Ford manuscript to Victor Navasky, editor of The Nation magazine. The Nation, published by respondent Nation Enterprises, is the oldest continuously published weekly magazine in the United States that reports and comments on politically significant news.[18] Navasky "neither solicited nor paid for" the purloined manuscript.[19] While immediately unaware of Time's prepublication rights, Navasky knew that his possession of the Ford manuscript was not authorized. As a result, he worked frenetically throughout a weekend, examining the memoirs and selecting material to develop "a real hot news story" before re-

13. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2221 (1985). These rights included "first serial rights" which are the exclusive rights to license prepublication excerpts. *Id.*
14. Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067, 1069 n.1 (S.D.N.Y.), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985).
15. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2222 (1985).
16. *Id.*
17. *Id.*
18. Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067, 1069 (S.D.N.Y.), *rev'd*, 723 F.2d 195 (2d Cir. 1983), *rev'd*, 105 S. Ct. 2218 (1985).
19. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 198 (2d Cir. 1983).

turning the copy to its source.[20] The April 9, 1979 issue of The Nation contained the article entitled "The Ford Memoirs: Behind the Nixon Pardon."[21] The 2,250 word article was developed from a manuscript of approximately 200,000 words.[22] The Nation's piece detailed the expected publication plans of Ford's book and mentioned Navasky's unauthorized possession of the memoirs draft. Other than these brief sidelights, the article consisted entirely of paraphrases, quotations, and facts "drawn exclusively from the manuscript."[23] Navasky provided no independent commentary.[24]

When Time editors learned of The Nation article, they sought permission to publish their licensed article a week earlier than was originally agreed. Harper & Row refused the request pointing to their "careful program coordinating the Time printing and the book's release."[25] Time subsequently terminated the prepublication agreement, canceled the publication of its piece, and refused to pay the remaining $12,500.[26] In June 1979, the memoirs, entitled *A Time to Heal: The Autobiography of Gerald R. Ford*,[27] were published. Subsequently, both the book and the manuscript were registered for copyright. It was undisputed that this work was protected by copyright at the time The Nation's article appeared in print.[28] The controverted issue at trial was whether The Nation legally appropriated the material under the fair use doctrine and whether certain portions of the material were protectible under the Copyright Act.

The federal district court held for Harper & Row, finding the totality of the historical facts, memoranda, and President Ford's reflections protected by copyright. The Nation's copying, characterized by Harper & Row as misappropriation of original expression, was held

20. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2222 (1985).

21. *See The Ford Memoirs: Behind the Nixon Pardon*, THE NATION, Apr. 9, 1979, at 353. The article is reproduced as an appendix to the opinion. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2235-40 (1985).

22. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2222, 2240 (1985).

23. *Id.* at 2222. The Second Circuit noted that this material from Ford's nonfiction work consisted primarily of historical facts. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 206-08 (2d Cir. 1983). Much of the information that Navasky initially believed to have been previously undisclosed had in fact been made public through Ford's congressional testimony during the 1974 Hungate Committee investigation of the Nixon pardon. *See Pardon of Richard M. Nixon and Related Matters: Hearings Before the Subcomm. on Criminal Justice of the House Comm. of the Judiciary*, 93d Cong., 2d Sess. 90-151 (1974).

24. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2222 (1985).

25. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 199 (2d Cir. 1983).

26. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2222 (1985).

27. G. FORD, A TIME TO HEAL: THE AUTOBIOGRAPHY OF GERALD R. FORD (1979).

28. Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067, 1070 n.3 (S.D.N.Y. 1983). 17 U.S.C. § 104(a) (1982) provides that "works specified by sections 102 and 103, while unpublished, are subject to protection . . . ."

not a fair use.[29] The court concluded that the fair use defense failed because the publication of the memoir excerpts was not for the use of "news reporting" and because The Nation's use supplanted Time's use of the original.[30] It was also argued that most of the material used by The Nation was not protectible by copyright. The court disagreed, holding that although portions of the manuscript were not copyrightable, the "totality" was protected by copyright.[31]

The Second Circuit reversed, focusing on the issue of whether the material used by The Nation was copyrightable.[32] The court noted that by granting rights in expression but not in facts or ideas, a copyright "is thus able to protect authors without impeding the public's access to that information which gives meaning to our society's highly valued freedom of expression."[33] Since the memoirs chronicled events of major significance, and the "paraphrasings concern[ed] the very essence of news and history," first amendment principles require that only the "barest elements—the ordering and choice of the words themselves"—be protected.[34] The court considered The Nation's use to be news reporting on a subject of public interest, and was thus a fair use.[35]

The court of appeals also rejected the lower court's holding that the incorporation of copyrightable expression with uncopyrightable facts is a "totality" protected by copyright law.[36] Judge Kaufman indicated that President Ford's "states of mind" were facts, and were not, therefore, eligible for protection.[37] The Nation "drew on scattered pieces of information from different pages and different chapters, and then described that information in its own words,"[38] which the court argued was permissible because historical information cannot be copyrighted.[39] The article also employed quoted, uncopyrightable conversations attributed to persons other than Ford, and other uncopyrighted governmental sources.[40] Absent the unprotected elements, the article contained roughly 300 copyrighted words.[41] The court held that this taking of President Ford's expression was fair use

29. Harper & Row, Publishers v. Nation Enters., 557 F. Supp. 1067, 1070-73 (S.D.N.Y. 1983).
30. *Id.*
31. *Id.* at 1072.
32. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195 (2d Cir. 1983).
33. *Id.* at 202, (citing 1 M. NIMMER, *supra* note 8, § 1.10[B][2], at 1-72) (footnote and some citations omitted).
34. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 204 (2d Cir. 1983).
35. *Id.* at 207-08.
36. *Id.* at 204-05.
37. *Id.*
38. *Id.* at 203.
39. *Id.* at 204.
40. *Id.* at 205.
41. *Id.* at 206.

and accordingly reversed the finding of infringement.[42]

On appeal, the Supreme Court found that The Nation had infringed Harper & Row's copyright on the Ford memoirs.[43] Rejecting The Nation's argument for a first amendment privilege of access to these politically significant materials, the Court restricted its analysis to the fair use privilege.[44] Consequently, the Court found that The Nation's use was primarily motivated by commercial gain,[45] and that while the memoirs were an historical or autobiographical work, the fact that they were unpublished tended to negate the defense of fair use.[46] Also, it determined that while the infringing work incorporated 300 copyrightable words from the manuscript, those taken were so vital to the book as to make the borrowing substantial.[47] Finally, the Court held that The Nation's article damaged the petitioner's potential market for the prepublication serialization rights in its copyrighted work, and that actual damages were suffered as a result of the taking.[48] The Court reversed the judgment of the Second Circuit and held that The Nation's article was not a fair use of Harper & Row's copyrighted material.[49]

III. ANALYSIS

A. Copyright and the First Amendment

1. Generally

Copyright protection extends only to "original works of authorship fixed in any tangible medium of expression."[50] Accordingly, protectible subject matter encompasses "any physical rendering of the fruits of creative intellectual or aesthetic labor."[51] An author is "he to whom anything owes its origin,"[52] and originality means that the work

42. *Id.* at 206-08.
43. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2225 (1985).
44. *Id.* at 2228-31.
45. *Id.* at 2231-32.
46. *Id.* at 2232-33.
47. *Id.* at 2233-34.
48. *Id.* at 2234-35.
49. *Id.* at 2235.
50. 17 U.S.C. § 102 (1982). The statutory subject matter is not intended to exhaust the constitutional grant. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 51 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5664; S. REP. NO. 473, 94th Cong., 1st Sess. 50 (1975), *reprinted in* 13 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 50 (1977).
51. Goldstein v. California, 412 U.S. 546, 561 (1973). *See, e.g.*, Mazer v. Stein, 347 U.S. 201 (1954) (statuettes used as lamp bases are protectible by copyright); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) (photograph may be protectible subject matter).
52. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

owes its creation to the author.[53] An author whose work satisfies these requirements is entitled to exercise the full panoply of statutory rights, including the exclusive rights of reproduction, distribution, and the preparation of derivative works.[54] Thus the author's fundamental interest is the right to prohibit the copying of the protected elements of the work.[55]

On the other hand, the first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[56] These freedoms establish a basis for the right of the public both to speak and to receive information,[57] in the hope of producing a politically enlightened citizenry capable of fostering the political and social values of a democratic society.[58] To that end, the first amendment "preserve[s] an uninhibited marketplace of ideas in which truth will ultimately prevail."[59] Free debate also provides an outlet for the expression of opposition to the political and societal status quo, thus defusing the potentially destabilizing forces of dissent.[60] Freedom of speech and expression are not intended to be restricted solely to the furthering and protection of political thought and debate. Indeed, the first amendment embodies a vision for the enlightenment of the individual in all facets of life. Justice Brandeis explained: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . ."[61]

Maintenance of the public dialogue necessary to foster a marketplace for the exploration of ideas is central to first amendment ideals. Without unfettered access to information, the dialogue cannot continue unimpeded. Arguably, copyright stands as an obstacle to the unrestricted access to information. A governmentally bestowed monopoly in "writings" theoretically conflicts with a constitutionally

53. Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 102 (2d Cir. 1951).

54. 17 U.S.C. § 106 (1982).

55. *See, e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); Jewelers' Circular Publishing v. Keystone Publishing, 274 F. 932 (S.D.N.Y. 1921), *aff'd*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922).

56. U.S. CONST. amend. I.

57. *See, e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 762-63 (1972); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969).

58. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948); Cohen v. California, 403 U.S. 15, 24 (1971).

59. Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969).

60. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis J., concurring); Nimmer, *The Right to Speak from* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 949 (1968) ("Those who are not permitted to express themselves in words are more likely to seek expression in violent deeds.").

61. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

protected system of free and full debate. One court articulated the problem as follows:

> The spirit of the first amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect the interest of quite a different nature.[62]

The conflict between copyright and first amendment freedoms is unique because both strive for the same laudable goal. "While the first amendment facilitates the flow of information by preventing government intervention, the copyright system encourages the development of information and its dissemination by providing incentives for publication."[63] The limitations on the monopoly imposed by the copyright system minimize any perceived conflict by attempting to ensure the fullest possible dissemination of information.[64]

Several significant limitations are imposed on the copyright owner's rights. First, a copyright will not protect "any idea, procedure, process, system, method of operation, concept, principle, or discovery."[65] This statutory limitation on the exclusive rights inherent in a copyright is a codification of the traditional distinction between idea and expression.[66] This idea/expression dichotomy limits protection to the particular manner in which the author's ideas are communicated, relegating the substance of the ideas to the public domain. According to Justice Brandeis, "the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[67] Any obstacle to the use of an author's contribution can inhibit future creative activity and the general dissemination of information, and may present a conflict with the first amendment. The idea/expression dichotomy serves to distinguish those elements of an author's work that must remain outside the scope of the author's control from those that may be retained by the author without impeding the public dialogue.

The final limitations on a copyright owner's rights considered here are the doctrines of substantial similarity and fair use. In an infringement suit, the author must demonstrate that her work has been copied

62. Rosemont Enters. v. Random House, Inc., 336 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (Lumbard and Hays, JJ., concurring).

63. Perlman & Rhinelander, *supra* note 2, at 404.

64. *See supra* notes 1-5 and accompanying text.

65. 17 U.S.C. § 106 (1982).

66. *See* H.R. REP. NO. 1476, *supra* note 50, at 57, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5670.

67. International News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

and that there is a substantial similarity of copyrightable expression.[68] The test for measuring "substantiality in terms of copyright infringement is not how much of the allegedly infringing work was taken from the copyrighted material but how much of the copyrighted material was taken by the infringing work."[69] Substantial similarity, therefore, permits a user to borrow from the original until the second work becomes substantially similar to the first.[70] The scope of protection cannot be limited to virtual duplication, "else a plagiarist would escape by immaterial variations."[71] Thus, infringement may result from "imitation, paraphrasing, or colorable alteration," as well as verbatim copying.[72]

Understandably, the courts have found it difficult to articulate a formula that satisfactorily distinguishes between unprotected ideas and protected expression. Judge Learned Hand's "abstractions test" has become the most resilient offering:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.[73]

Thus, the second author may borrow from the first until she no longer appropriates simply the ideas, but also the expression of the first. Despite the difficulty in defining a workable test, the idea/expression distinction remains an important device for accommodating constitutional speech interests. Where an infringing work incorporates a minimal appropriation of expression, the constitutional standard is generally satisfied by the substantial similarity test. The fair use doctrine may protect more extensive appropriations, however, as it "operates when the objectives of the copyright system would be frustrated rather than furthered by a finding of infringement."[74]

Fair use has been described as a "privilege in others than the

68. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).
69. Rosemont Enters. v. Random House, Inc., 256 F. Supp. 55, 63 (S.D.N.Y.), *rev'd*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *see* Toksvig v. Bruce Publishing, 181 F.2d 664, 667 (7th Cir. 1950); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936); West Publishing v. Lawyers Co-operative Publishing, 79 F. 756, 763 (2d Cir. 1897).
70. *See* 3 M. NIMMER, *supra* note 8, § 13.03, at 13-18.
71. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).
72. A. LATMAN, THE COPYRIGHT LAW 165 (5th ed. 1979).
73. Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931).
74. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516, 524 (1981).

owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright."[75] The Copyright Act of 1976, representing the first statutory codification of the doctrine, offers no definition.[76] The drafters who contemplated the task arrived at the conclusion that "no generally applicable definition is possible" because "each case raising the question must be decided on its own facts."[77] The statute offers four considerations for determining whether a particular use is fair: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[78] This provision of the copyright statute is nothing more than a codification of the common law fair use doctrine. "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[79]

What is clear about the issue of fair use is that "it is not easy to decide what is and what is not fair use."[80] The problem is perhaps "the most troublesome in the whole law of copyright."[81] In fact, prior to *Sony Corp. of America v. Universal City Studios*[82] the issue of fair

75. H. BALL, THE LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944). A former Register of Copyright offers this definition: "[Fair use] eludes precise definition; broadly speaking, it means that a reasonable portion of a copyrighted work may be reproduced without permission when necessary for a legitimate purpose which is not competitive with the copyright owner's market for his work." HOUSE COMM. ON THE JUDICIARY, 87TH CONG., 1ST SESS. COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 24 (Comm. Print 1961), *reprinted in* 3 OMNIBUS COPYRIGHT LAW REVISION LEGISLATIVE HISTORY 24 (1977).

76. 17 U.S.C. § 107 (1982).

77. H.R. REP. NO. 1476, *supra* note 50, at 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5679.

78. 17 U.S.C. § 107 (1982). The statute closely reflects the factors articulated by Justice Story in what is considered to be the first American fair use case: "[W]e must . . . look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (No. 4901).

79. H.R. REP. NO. 1476, *supra* note 50, at 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5680.

80. Cohen, *Fair Use in the Law of Copyright*, 6 COPYRIGHT L. SYMP. (ASCAP) 43, 53 (1955).

81. Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939). Justice Story commented: "This is one of those intricate and embarrassing questions . . . in which it is not . . . easy to arrive at any satisfactory conclusion, or to lay down any general principles applicable to all cases. . . . [T]he lines . . . sometimes, become almost evanescent, or melt into each other." Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).

82. 464 U.S. 417 (1984).

use had been presented to the Supreme Court twice and in each of those cases the lower court opinion was affirmed, without opinion, by an equally divided Court.[83] There is little doubt that "[a] single doctrine that has forced the Court to divide equally twice can claim some measure of difficulty."[84]

Essentially, fair use is an affirmative defense to copyright infringement.[85] It therefore operates as "one of the most important and well-established limitations on the exclusive right of copyright owners"[86] by balancing the rights of authors and the public interest in access to information. The fair use privilege applies when the first amendment values demand access to more than abstract ideas. For instance, when freedom of speech demands unrestricted access to both the ideas and the author's particular form of expression, fair use is the flexible principle that accommodates that use. Fair use allows much more extensive borrowing of copyrighted material than does the substantial similarity requirement and it can be utilized as a defense even when there has been a substantial appropriation of expression.[87] Fair use eases inherent tensions between copyright law and the first amendment in that it seeks interests similar to those of the right of free speech by focusing on the constitutional interest in the flow of information. Yet, at the same time, "it seeks to ensure that copyright interests are not sacrificed needlessly where alternative means of producing the desired result are available."[88]

2. *The First Amendment Exception to Copyright*

Recently, courts and commentators have begun discussing the possibility of a "public interest" or first amendment exception that would further narrow the copyright monopoly.[89] This public interest consideration is greatest in those situations involving copyrighted materials that cannot be reduced to an assortment of facts or ideas because it is

83. Benny v. Loew's, Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd sub nom.* Columbia Broadcasting Sys. v. Loew's, Inc., 356 U.S. 43 (1958) (4-4 decision; Douglas, J., did not vote); Williams & Wilkins v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (4-4 decision; Blackmun, J., did not vote). A third case was remanded because of an inadequate record. Public Affairs Assocs. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), *vacated*, 369 U.S. 111 (1962).

84. Perlman & Rhinelander, *supra* note 2, at 379.

85. *See* 3 M. NIMMER, *supra* note 8, § 13.05, at 13-62.

86. H.R. REP. NO. 1476, *supra* note 50, at 65, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5678.

87. *See, e.g.*, Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (4-4 decision; Blackmun, J., did not vote) (photocopying of entire articles from medical journals held fair use); Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (complete copying by video tape recorder owners is fair use).

88. *See* Denicola, *supra* note 7, at 297.

89. *See supra* note 7 and accompanying text.

the author's specific expression that is needed. Only a verbatim copy of the protected material will suffice to convey accurately the desired expressive impact. In some circumstances, the fair use doctrine permits this type of use.[90]

With respect to the origins of the public interest exception, it has been suggested that the copyright clause of the Constitution[91] is a possible source.[92] However, this is unlikely since public interest is not one of the express criteria traditionally used in a fair use inquiry.[93] The copyright clause was intended to benefit ultimately society by granting authors exclusive rights to their work.[94] It can be inferred from the legislative history of the Copyright Act that the codification of the traditional fair use doctrine represents the proper balance between the advancement of the arts and sciences and the congressional authority to grant exclusive rights to authors.[95] Also, because the first amendment supersedes any inconsistent material within the text of the Constitution,[96] and a potential for conflict between the first amendment and the copyright law exists,[97] it would be unwise to rest this exception on the copyright clause.

The first amendment is the most likely source of the public interest exception.[98] When the public's right to unimpaired access to information is hindered by copyright, the first amendment should protect the public interest in the dissemination of information.[99] If the role of the first amendment is to foster the flow of information to the public, then it could be argued that copyright restricts the flow of information, and is therefore antagonistic to the public interest. That reasoning would not be inconsistent with the Supreme Court's interpretation of the first amendment.[100]

The first amendment should not be read so as to undermine entirely the copyright protection afforded publicly significant materials. Every copyrighted work can theoretically generate some public interest. However, this interest should not be translated into a license for the wholesale usurpation of the author's labor. This practice would eventually erode the economic incentives to create and disseminate

90. *See supra* note 87 and accompanying text.
91. U.S. CONST. art. I, § 8, cl. 8.
92. 1 M. NIMMER, *supra*, note 8, § 1.10[A], at 1-63; Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).
93. *See supra* note 78 and accompanying text.
94. *See supra* note 5 and accompanying text.
95. *See* H.R. REP. NO. 1476, *supra* note 50, at 65-66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5678-80.
96. *See supra* note 8.
97. *See supra* notes 50-63 and accompanying text.
98. *See supra* note 6.
99. *See* Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) (Lumbard, J., concurring).
100. *See supra* notes 56-61 and accompanying text.

those copyrightable materials of interest to the public. The right to receive information would eventually become meaningless as the public dialogue would be devoid of any significant contributions.[101]

In *Harper & Row*, the Court rejected The Nation's assertion that "the substantial public import of the subject matter of the Ford memoirs" excused its unfair use of the manuscript in the creation of its article.[102] Fearing the potential loss of access to sources of significant historical information by the public, Justice O'Connor made it clear that the doctrine of fair use would not be unnecessarily expanded "to create what amounts to a public figure exception to copyright."[103] To do so would be unnecessary since the Copyright Act itself provides sufficient safeguards to satisfy first amendment values through the idea/expression dichotomy and the fair use doctrine.[104] Such a public interest qualification is unnecessary and potentially more damaging than profitable to the public welfare.[105] To acknowledge the proposed privilege in this type of socially meaningful work would effectively cripple a copyright system that works to contribute resources to the store of knowledge.[106]

Because copyright protects only the particular vehicle through which the author has expressed herself, it does not significantly frustrate first amendment values of free speech. Only in rare situations should the author's specific expression be eligible for wholesale appropriation.[107] The public interest in the dissemination of information is strengthened by a fundamental limitation on copyright protection. Copyright does not provide a monopoly over facts or ideas.[108] Moreover, the substantial similarity and fair use doctrines are vital safeguards to the constitutional interest in the public access to informational works. Thus copyright operates to prevent only substantial borrowing of information for use in works that compete directly or indirectly with the original. In fact, it could be argued, copyright is the vehicle for the dissemination of that information.[109] As one court stated: "Where the first amendment removes obstacles

101. *See* Sobel, *supra* note 7, at 78-79.
102. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2228 (1985).
103. *Id.* at 2230.
104. *See* Denicola, *supra* note 7, at 290.
105. "In view of the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas, and the latitude for scholarship and comment traditionally afforded by fair use, we see no warrant for expanding the doctrine of fair use. . . ." Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2230 (1985).
106. "Respondent's [public interest privilege] theory . . . would effectively destroy any expectation of copyright protection in the work of a public figure." *Id.* at 2229.
107. *See supra* notes 74-88 and accompanying text.
108. 17 U.S.C. § 102 (1982).
109. "In our haste to disseminate news, it should not be forgotten that the Framers

to the free flow of ideas, copyright law adds positive incentives to encourage the flow."[110]

To assure authors of factual narratives, such as the one involved in *Harper & Row*, that they may enjoy "the right to market the original expression contained therein as just compensation for their investment," the majority properly refused to recognize a special first amendment exception to the copyright statue.[111] Without this special privilege to excuse its taking of copyrighted material, The Nation's use was subjected to a traditional fair use analysis.

B. Fair Use

The statutory provision concerning fair use is silent as to the relative weight to be accorded each of the enunciated factors in the fair use determination.[112] Most fair use discussions, therefore, proceed within the context and format provided in the statute.

1. The Purpose and Character of The Nation's Use

The purpose and character of the use is often limited to a characterization of the infringing work as either a commercial use or one that is for a nonprofit purpose.[113] In this way, fair use is designed to distinguish between "a true scholar and a chiseler who infringes a work for personal profit."[114] And while "any commercial use tends to cut against a fair use defense,"[115] a commercial use does not automatically preclude a finding of fair use.[116] The infringer's commercial motive has thus been minimized by some courts.[117]

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intended copyright itself to be the engine of free expression." Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2230 (1985).

110. Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1499 n.14 (11th Cir. 1984).

111. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2229 (1985).

112. 17 U.S.C. § 107 (1982). *See also* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 476 (1984) (Blackmun, J., dissenting).

113. 17 U.S.C. § 107(1) (1982). The nonprofit characterization is not limited to educational purposes.

114. *Hearings on Bills for the General Revision of the Copyright Law Before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 1706 (1966) (statement of John Schulman), *reprinted in* 7 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 1706 (1976).

115. Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1175 (5th Cir. 1980). *See* 3 M. NIMMER, *supra* note 8, § 13.05[A][1], at 13-70 to 13-71.

116. *See* H.R. REP. NO. 1476, *supra* note 50, at 66, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS, at 5679; S. REP. NO. 473, *supra* note 50, at 62; 3 M. NIMMER, *supra* note 8, § 13.05[A][1], at 13-69 n.24.

117. "The fact that profit was involved is . . . legally irrelevant where the work in which the use appears offers some benefit to the public." Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 208 (2d Cir. 1983). In those cases in which the "public interest" is considered predominant, the courts have excused the infringer's profit motive and characterized the purpose as fair use. *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (video tape recording

Despite this trend, in *Sony Corp. of America v. Universal City Studios*[118] the Supreme Court noted that "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright."[119] Where the user stands to profit from the exploitation of the copyrighted material at the expense of the author, the fair use defense justifiably should not protect the infringer.[120] However, merely because the user has a commercial motive does not necessarily decrease the public benefit derived from the use; neither should it automatically preclude a finding of fair use.[121] One court indicated that "whether an author or publisher has a commercial motive or writes in a popular style is irrelevant to a determination of whether a particular use of copyrighted material in a work which offers some benefit to the public constitutes a fair use."[122]

The public interest in the dissemination of information sometimes requires a flexible fair use defense that provides broad latitude to subsequent researchers who desire to make their own contributions to the public dialogue by building on the undertakings of earlier authors.[123] However, when the second author adds little or nothing to the work of prior authors, the benefit gained by the public is negligible. Courts have thus closely scrutinized the independent research of the subsequent author.[124] In *Harper & Row*, the public gained little benefit

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yields societal benefits by expanding public access to television programs); Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044 (2d Cir. 1983), *cert. denied*, 105 S. Ct. 100 (1984) (use in television advertisements of excerpts from *Consumer Reports* served an "information function").

118. 464 U.S. 417 (1984).

119. *Id.* at 451.

120. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2231 (1985).

121. *See, e.g.*, Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171 (5th Cir. 1980); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307-09 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

122. Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

123. *See, e.g.*, Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); New York Times Co. v. Roxbury Data Interface, Inc., 434 F. Supp. 217 (D.N.J. 1977); Gardner v. Nizer, 391 F. Supp. 940 (S.D.N.Y. 1975).

The Copyright Act includes "news reporting" and "research" among its illustrative list of uses that may fall within the scope of the fair use doctrine. 17 U.S.C. § 107 (1982).

124. *See, e.g.*, Hoehling v. Universal City Studios, 618 F.2d 972, 976, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); Eisenschiml v. Fawcett Publications, 246 F.2d 598, 600-03 (7th Cir.), *cert. denied*, 355 U.S. 907 (1957). The decisions indicate a greater inclination to impose liability where the defendant's independent research is minimal or non-existent. *See, e.g.*, Wainwright Sec., Inc. v. Wall St. Transcript Corp., 558 F.2d 91, 96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978); Miller v. Universal City Studios, 460 F. Supp. 984 (S.D. Fla. 1978),

from The Nation's publication of excerpts from the manuscript since the article copied verbatim or only slightly paraphrased the original and added no criticism or insight regarding the material copied.

The Court unanimously agreed that the general purpose of The Nation's use of Ford's memoirs was for the reporting of a news event.[125] However laudable the underlying purpose may have been, the majority characterized the magazine's actions as exploiting "the headline value of its infringement, making a 'news event' out of its unauthorized first publication of a noted figure's copyrighted expression."[126] Wholesale usurpation of an author's expression is not defensible under the rubric of fair use when the expression is not closely wedded to the ideas contained therein, even if it is for the purpose of reporting news.

With respect to The Nation's argument that it was merely reporting news, the Supreme Court responded that the issue was " 'not what constitutes news, but whether a claim of news reporting is a valid fair use defense to an infringement of copyrightable expression.' "[127] If the only material taken by The Nation had been "news," there would have been no infringement since news is not copyrightable.[128] And thus if infringement is demonstrated, the courts should not be "chary"[129] of examining whether the material was appropriated for the reporting of news or for commercial purposes. Indeed, the courts routinely inquire into the borrower's stated purpose.[130] Thus, the Court properly held for Harper & Row with respect to the purpose and character of The Nation's use of the Ford memoirs.

2. *The Nature of the Copyrighted Work*

Some works will have greater significance than others for subsequent authors who wish to contribute to the public dialogue. It is not uncommon, then, for the courts to permit a more liberal taking from

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rev'd, 650 F.2d 1365 (5th Cir. 1981); Holdredge v. Knight Publishing, 214 F. Supp. 921 (S.D. Cal. 1963).

125. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2231 (1985); *id.* at 2246 (Brennan, J., dissenting).

126. *Id.* at 2231.

127. *Id.* (quoting W. PATRY, THE FAIR USE PRIVILEGE IN COPYRIGHT LAW 119 (1985)).

128. *See* A. LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14 (1958), *Copyright Law Revision, Subcomm. on Patents, Trademarks, and Copyrights, Senate Comm. on the Judiciary*, 86th Cong., 2d Sess. 30 (Comm. Print 1960), *reprinted in* 1 OMNIBUS COPYRIGHT LEGISLATIVE HISTORY 30 (1977).

129. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2231 (1985).

130. Pacific & S. Co. v. Duncan, 744 F.2d 1490 (11th Cir. 1984); Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos., 621 F.2d 57, 60 (2d Cir. 1980); Roy Export Co. v. Columbia Broadcasting Sys., 503 F. Supp. 1137 (S.D.N.Y. 1980), *aff'd*, 672 F.2d 1095, 1099 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982).

"work[s] more of diligence than of originality or inventiveness."[131] The scope of permissible fair use of primarily informational works must of necessity be greater "[s]ince the risk of restraining the free flow of information is more significant with informational work."[132] Thus, with historical or autobiographical accounts, the scope of protection is markedly decreased. The author has exclusive control of her expression,[133] but the factual substance is consistently denied protection. Subsequent authors are thus able to borrow extensively from prior historical works, short of bodily appropriating the literal expression of the writer.[134] Biographers, historians, and treatise writers are permitted this broad latitude because of "the public benefit in encouraging the development of historical and biographical works."[135]

A Time to Heal is a work which recounts and relates facts of momentus historical significance. The Court characterized it as an "unpublished historical narrative or autobiography" and acknowledged the compelling necessity for the broad dissemination of factual works.[136] Nevertheless, the majority was convinced that The Nation exceeded the use necessary to disseminate the ideas contained in Ford's manuscript when it "excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression."[137] Simply put, the Court did not consider Ford's expression so closely wedded to his ideas as to warrant The Nation's extensive quoting and paraphrasing.

Overshadowing this important aspect of the fair use analysis is the Court's emphasis on the "critical element" of the manuscript's unpublished nature.[138] Reasoning that section 106(3) of the Copyright Act provides the owner exclusive rights to publication and thus the right to control the first public distribution, the Court concluded that the right of first publication was unique to the author and that, therefore, the scope of the fair use defense must be restricted when applied to unpublished works.[139] Thus, while the unpublished nature of a work

131. New York Times v. Roxbury Data Interface, Inc., 434 F. Supp. 217, 221 (D.N.J. 1977).
132. Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 105 S. Ct. 100 (1984).
133. Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485, 488 (9th Cir. 1984); Hoehling v. Universal City Studios, 618 F.2d 972, 974 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).
134. Hoehling v. Universal City Studios, 618 F.2d 972, 978 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); Meeropol v. Nizer, 560 F.2d 1061, 1069 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).
135. Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 307 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).
136. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2232 (1985).
137. *Id.*
138. *Id.* at 2232-33.
139. *Id.* at 2227.

is not determinative, it tends to negate a fair use defense.[140]

The legislative debate reflects the necessity of maintaining a narrow scope of fair use protection for subsequent users where unpublished works are concerned.[141] By anticipating Harper & Row's deliberate choice of the date and method for publication of the memoirs, The Nation usurped the copyright owner's exclusive right to control the distribution of the work. In addition, there were no extraordinary circumstances in *Harper & Row* that would justify an exception to the limitation on fair use of unpublished works. While it is true that the copyright law "was not meant to obstruct the citizens' access to vital facts and historical observations about our nation's life,"[142] *Harper & Row* did not involve that type of obstruction. *A Time to Heal*, which contained the entire record of facts and historical observations revealed by Ford, was to be released three weeks after The Nation's unauthorized article appeared in print. Thus, *Harper & Row* exemplifies valid court protection of an author's expression in accordance with the policies of the copyright law,[143] without the suppression of any fact or idea contained in the copyrighted work.

3. The Amount and Substantiality of the Taking

In the development of its article, The Nation used between 300 and 400 words from the Ford manuscript,[144] which amounted to approximately thirteen percent of the article.[145] However, the "expressive value of the excerpts and their key role in the infringing work" led the Court in *Harper & Row* to conclude that The Nation's use was not fair.[146]

Fair use is premised on equitable principles of reasonableness.[147] Thus substantial copying or paraphrasing of a copyrighted work does not qualify for protection under the doctrine.[148] Courts typically take a quantitative approach calculating the percentage or the number of words of the copyrighted work that have been appropriated. Moreover, "the test of substantiality . . . is not how much of the allegedly

140. *Id.* at 2227-28.
141. S. REP. NO. 473, *supra* note 50, at 65.
142. Harper & Row, Publishers v. Nation Enters., 723 F.2d 195, 208 (2d Cir. 1983).
143. *See supra* notes 65-67 and accompanying text.
144. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2225 (1985).
145. *Id.* at 2234.
146. *Id.*
147. *See* A. LATMAN, *supra* note 128, at 5.
148. Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 310 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); 3 M. NIMMER, *supra* note 8, § 13.05[D][1], at 13-89. *But cf.* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417 (1984) (complete copying by video tape recorder owners is fair use); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), *aff'd*, 420 U.S. 376 (1975) (4-4 decision; Blackmun, J., did not vote) (photocopying of entire articles from medical journals held fair use).

infringing work was taken . . . but how much of the copyrighted material was taken by the infringing work."[149] The question of substantiality, however, cannot rest solely on the simple tabulation of those copyrighted expressions that have been inserted in the second work. The quality and significance of the misappropriated expression weighs heavily in this determination.[150] Thus, "[t]aking what is in essence the heart of the work is considered a taking of a substantial nature, even if what is actually taken is less than extensive."[151]

The courts have struggled for some time with the elusive problem of defining a permissible taking in the area of criticism and review. Justice Story noted the importance of good faith in these situations:

> [N]o one can doubt that a reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.[152]

Fair use therefore demands that an infringing use not supplant the work from which it extensively appropriated. In its article, The Nation incorporated some of the most interesting and distinctive passages from the memoirs. The quantity of the words taken may have been infinitesimal, but the significance of the appropriated portions to Ford's revelations was immeasurable.

4. Effect Upon Harper & Row's Potential Market

The harm or potential harm to the plaintiff's market, while the last of the statutorily enumerated criterion in the fair use inquiry, is considered by courts[153] and commentators[154] alike to be "the single most important element of fair use."[155] This concern is maximized where the infringing work prejudices the original in terms of actual or potential consumer demand.[156] Copies that do not compete significantly with the copyrighted work and thus have a minimal impact on the market for the original are eligible for greater fair use protection than

149. Rosemont Enters. v. Random House, Inc., 256 F. Supp. 55, 63 (S.D.N.Y.), *rev'd on other grounds*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).
150. *Id.*
151. WPOW, Inc. v. MRLJ Enters., 584 F. Supp. 132, 136 (D.D.C. 1984). *See also* Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1497 n.11 (11th Cir. 1984) ("a small portion of a work may be especially significant").
152. Folsom v. Marsh, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841) (No. 4901).
153. *See* Triangle Publications v. Knight-Ridder Newspapers, 626 F.2d 1171, 1177 (5th Cir. 1980).
154. 3 M. NIMMER, *supra* note 8, § 13.05[A][4], at 13-76.
155. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2234 (1985).
156. Consumers Union of United States, Inc. v. General Signal Corp., 724 F.2d 1044, 1051 (2d Cir. 1983), *cert. denied*, 105 S. Ct. 100 (1984).

copies that make large inroads on the author's market.[157]

The copyright owner's exclusive rights operate to protect against actual market prejudice and to prevent an erosion of the potential value of the work that the owner may not have already exploited. A copyright enables its owner not only to directly market her work but also to adapt her work to other media.[158] The copyright owner is afforded protection even if she has not exercised this adaptation privilege.[159] As a result, copyright law does not generally require that a copy directly compete with the original in order to disrupt its potential market. An infringement can occur even if the copyrighted work is adapted into another form, because the copyright owner is entitled to "any lawful use of his property whereby he may get a profit out of it. . . . It is the commercial value of his property that he is protected for."[160] Thus, it has been suggested that making an unauthorized motion picture from a copyrighted novel would not be a fair use.[161] A logical extension of this rationale would prohibit the reproduction of an author's copyrighted expression of significant historical facts in a forum other than one of her own choosing.

As the Court in *Sony Corp. of America v. Universal City Studios* noted:

> Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, the likelihood may be presumed.[162]

The Nation's borrowing of the verbatim quotes from the unpublished manuscript lent credence and authenticity to its article, but in so doing it directly competed for a portion of the market for prepublication excerpts.[163] Notwithstanding the dissent's argument that it was The Nation's use of uncopyrightable information which caused Time to cancel its contract,[164] the credibility of the article rested on its extraction of the author's expression. The Court's concern for the "sub-

157. Meeropol v. Nizer, 560 F.2d 1061, 1069-70 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); 3 M. NIMMER, *supra* note 8, § 13.05[B], at 13-72.

158. *See* 17 U.S.C. § 106 (1982). "[A] use that supplants any part of the normal market for a copyrighted work would ordinarily be considered an infringement." S. REP. No. 473, *supra* note 50, at 65.

159. 3 M. NIMMER, *supra* note 8, § 13.05[B], at 13-79. While the copyright owner is entitled to the potential profit from her work as well as to any realized profit, it does not necessarily follow that the owner has suffered no harm when the work has returned little profit prior to the infringement. *Id.* at 13-79 n.39.1.

160. King Features Syndicate v. Fleischer, 299 F. 533, 536 (2d Cir. 1924).

161. 3 M. NIMMER, *supra* note 8, § 13.05[B], at 13-77 to 13-78. *See also* Goldstein, *supra* note 7, at 1030-31.

162. Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 451 (1984).

163. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2235 (1985).

164. *Id.* at 2252-53.

stantial potential for damage to the marketability of first serialization rights"[165] is not in conflict with the first amendment values since the expression used was in fact destined for publication. Any nonconsensual interference in the development of a market for intellectual property could seriously impede the future creation of these works and in turn inhibit the harvest of knowledge contemplated by the first amendment.

Since the predominate purpose of The Nation's use was commercial gain, the likelihood of future harm to Harper & Row could be presumed. This was, however, a rare case involving "clear cut evidence of actual damage."[166] Time canceled its contract with Harper & Row and refused to pay the remaining $12,500 as a result of The Nation's article.[167] Under these circumstances, the fair use exception was properly denied.

IV. CONCLUSION

In *Harper & Row*, the Supreme Court confronted serious questions concerning the interface of the first amendment and copyright law. Acknowledging copyright's inherent accommodations of first amendment values primarily through the implementation of the idea/expression dichotomy and the fair use doctrine, the Court refused to create what it characterized as a "public figure exception" to the existing copyright scheme.[168] The copyright system is itself an effort to implement the constitutionally sanctioned aim of encouraging creativity. This aim would be needlessly undermined by the creation of a separate first amendment exception since the user can adequately exercise her right of free speech, and the public can gain access to significant works, through a recognition of the copyright owner's proprietary right to distribute her work in a time and manner that she deems proper.

This decision reflects the perception that copyright and the first amendment serve the same laudable purpose—the fullest possible dissemination of ideas and information for the ultimate benefit of the general public. The "harvest of knowledge" contemplated by the first amendment is furthered by copyright incentives which cultivate "original works that provide the seed and substance of this harvest."[169] Since the internal mechanisms of the copyright law fulfill the free speech goals of the first amendment, it is unnecessary to establish a significant first amendment privilege to infringement, particularly in

165. *Id.* at 2235.
166. *Id.* at 2234.
167. *See supra* notes 25-26 and accompanying text.
168. Harper & Row, Publishers v. Nation Enters., 105 S. Ct. 2218, 2230 (1985).
169. *Id.* at 2223.

those cases where an author's work is destined for public consumption.

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